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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1994

CASE NUMBER 93-1921

ERNESTO ALEOTTI, Petitioner

versus

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY OF PETITIONER TO BRIEF IN OPPOSITION BY RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Trial Court Judge, in the trial of a criminal case, should make an inquiry, upon the record, of a non-testifying defendant, prior to the close of the trial of the case, as to whether or not the defendant is knowingly, intelligently, and voluntarily waiving their right to testify.

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ARGUMENT

The Petitioner respectfully submits that the question before the Court begs for consideration and resolution by this Honorable Court. There is conflict and confusion among the Trial Bar, as well as among the Courts, both at the State and Federal level, as to the entire issue of the procedure to be followed in criminal cases in which the Defendant does not testify. As indicated in the Petition in this case, the issue presented in this case currently before the Court has not been decided by this Court and, therefore, this Court should seize this moment to resolve this issue. Contrary to the position of the Respondent, this High Court should be guided, not by the question as to whether or not its Decision will, in any way, impact upon the ultimate conclusion in this case.

More importantly, this High Court has the solemn duty of interpreting the Constitution of the United States, irrespective of whether or not the resolution of this issue by the Court would affect, ultimately, the outcome of the Trial of Ernesto Aleotti.

Therefore, the mere notion by the Respondent that this Court "...should await a case in which the Court's Decision might affect the outcome" is ludicrous. This Honorable Court, sitting very much as the Lady of Justice, should be blindfolded, as to the personalities in a case, and look more to the substance of the issue before the Court in such a case. As indicated, this issue has been the subject of many cases, both at the Trial level, as well as at the State and Federal Appellate levels. The decisions of the Courts in this regard are in

conflict and should be resolved. Thus, it is important that this Honorable Court review the issue presented in this case, and grant this Petition, in order to clarify this issue now, once and for all and end all of the confusion.

Perhaps the best analysis of this very important issue was set forth by Professor Timothy P. O'Neill in that certain Law Review article captioned, "Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for An On-The-Record Waiver". Professor O'Neill is an Associate Professor of Law at the John Marshall Law School. His Treatise appears in the University of Pittsburgh Law Review, Vol. 51, Edition No. 4, Summer of 1990. The Petitioner, in addition to citing this Article for the Court's review and consideration, would

also submit that this Law Review Article by Professor O'Neill is one of the best dissertations analyzing the essence of this issue, to-wit, the right of an accused to testify in a criminal case. Professor O'Neill traces the history and evolution of the general concept of the right of an accused to testify, from the beginning, through the present, addressing, in conclusion, the essence of this Appeal, the concept of the importance of having a clear and articulated recitation upon the record, of the decision by an accused in a criminal case to waive their right to testify. As such, the Petitioner respectfully begs this Court's indulgence and review of the Law Review article by Professor O'Neill.

Professor O'Neill sets forth some basic reasons why this issue should be given great priority. In particular, he suggests the following, to-wit:

> "Thus, prevailing case law suggests that the Supreme Court would find that the right to testify can only be waived personally by the defendant. Several policy reasons also argue in favor of recognizing that such a decision should be the defendant's alone. First, if the defendant should have final say over whether to exercise those rights deemed "inherently personal and basic, People v. Curtis, 681 P.2d 504, 511 (Colo. 1984), it would seem proper to include among these the right to testify, deemed by one court to be "of inestimable value". Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955). The Supreme Court has noted that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself, Green v. United States, 365 U.S. 301, 304. As noted above, the *Rock* Court itself analyzed the situation to a defendant's decision to represent himself at trial if he so chooses, Faretta v. California, 411 U.S. 806 (1975), and concluded that the

decision whether or not to testify is an equally personal decision. If the defendant should be given every opportunity to make those decisions which may result in his remaining free from incarceration, clearly the right to testify is one of them.

"Even if the majority of defendants were to make foolish tactical decisions on this issue, there is a second, more philosophical, reason why a defendant should still be given this power. At least one commentator has expressed it in terms of "human dignity":

> If the right to testify in one's own behalf is to have any meaning, it cannot be taken away from a defendant who feels the human instinct to meet the accusations against him despite counsel's advice that unfortunate consequences may result. A defendant should be recognized as having a basic right to plead his case before his peers, and neither the court not defense counsel should be permitted to deprive a defendant of that right to exercise his free will. Wright v. Estelle, 572 F.2d 1071, 1078-79 (5th Cir.).

"As Judge Godbold wrote in Wright v. Estelle, regardless ow whether choosing to testify is tactically correct, the defendant's "desire to tell 'his side' in a public forum may be of overriding importance to him .... The wisdom or unwisdom of the defendant's choice does not diminish his right to make it. Wright v. Estelle, 572 F.2d 1071, 1078-79 (5th Cir.).

"The legal literature points out a third consideration, namely that in practice defense attorneys accede to a defendant's desire to testify over an attorney's objection. A review of the literature in the area led one commentator to conclude that it was the "general belief of expert criminal attorneys" that the defendant must agree before his right to testify is waived. Professor Amsterdam perhaps best summarized this view from the defense attorney's perspective: "Counsel may properly urge the defendant that it is unwise or dangerous for the defendant to take the stand. If, however, a defendant wishes to testify despite advice to the contrary, it is probably best to yield to his or her stubbornness". 1. A Amsterdam Trial Manual for The Defense of Criminal Cases, Sect. 391. (4th Ed. 1984).

> This is not to suggest that courts are unanimous in finding the decision of whether or not to testify to be personal to the defendant. United States v. Norwood, 798 F.2d 1094, 1100 (7th Cir.). Yet the potent combination of lower court case law, legal literature, and signals from the Supreme Court would seem to suggest that this will be firmly established in the future.

Further, Professor O'Neill suggests a possible solution, an "on-the-record" waiver, without judicial involvement. Professor O'Neill explained this approach as follows, to-wit:

> "In Curtis, the Colorado Supreme Court described in some detail how a waiver should be obtained from a defendant who does not choose to testify. People v. Curtis, 681 P.2d 504, 514-15 (Colo. 1984). Courts in other jurisdictions have heatedly debated the propriety of having a trial judge obtain a waiver in the manner suggested by Curtis.
>
> "Yet it does not appear that any court has noticed footnote 13 of the Curtis opinion and the accompanying text. There, the court directly confronted the concern, voiced by the

Wisconsin Supreme Court in State v. Albright, 96 Wis. 2d 122, 291 N.W. 2d 487 (1980), that injecting the trial judge into the defendant's decision to testify was fraught with difficulty. Curtis and Albright's concerns, holding that the trial court "generally" will advise the defendant properly. Yet Curtis went on to say: "The trial judge could discharge this duty by permitting defense counsel to question the defendant on-the-record in the presence of the judge. There may be situations where it would be preferable to determine the defendant's wishes in that manner. Curtis makes no attempt to describe what these "situations" might be. It does not appear that nay court has noticed this important suggestion in Curtis that it might be possible to obtain an on-the-record waiver of the right to testify while avoiding judicial involvement in the procedure. Yet such a procedure would seem ideal for those courts which desire an on-the-record waiver but wish to exclude the trial judge.

"Obtaining a waiver through a procedure which circumvents the trial judge would not seem to raise any constitutional problem *per se*, even if the right is considered personal to the defendant. For example, a

guilty plea is valid only if the defendant tenders it voluntarily, intelligently, and understandingly. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). Yet the Supreme Court has refused to require on constitutional grounds any specific warnings from the trial judge; rather, the focus is on whether the plea itself is voluntary and intelligent. Likewise, it is not constitutionally required that the trial judge and the defendant engage in a colloquy in order for a jury waiver to be found valid. United States v. Cochran, 770 F.2d 850 (9th Cir. 1985); United States v. Martin, 704 F.2d 267 (6th Cir. 1983); United States v. Scott, 583 F.2d 362 (7th Cir. 1978). There is no reason, then, why a colloquy between judge and defendant concerning the defendant's right to testify should be required as a constitutional matter even if the right to testify is considered a fundamental personal right.

"Moreover, placing the onus of establishing the waiver on the defense solves another problem that arises when courts confront this issue: "When then ought the colloquy between judge and defendant occur? The judge cannot know that the defendant has not testified until the defense has rested.

> That is surely an awkward time to engage in a discussion with the defendant which might lead to a rupture with defense counsel...." In a system in which the defense takes the initiative, this problem is avoided. It is up to the defendant and his attorney to decide when they wish to place the waiver of the right to testify into the record.
>
> "The courts which have rejected the Curtis system of on-the-record waiver have simply assumed that the trial judge must take the leading part in such a procedure. It is time, then, to consider seriously Curtis's suggestion of an alternative which bypasses the trial judge.

In conclusion, as Professor O'Neill suggests, this Court could consider alternatives to ensure a proper waiver of the accused's right to testify. Professor O'Neill suggests several alternatives, which the Petitioner respectfully submits are applicable for this Court's consideration of this important issue. Professor O'Neill

suggests such alternatives, as follows, to-wit:

> "The alternative system would be comprised of the following:
>
> 1. At every criminal trial, the defendant must either a) testify on his own behalf or b) waive his right to testify on the record.
>
> 2. Consistent with A.B.A. Standards, it is the responsibility of the defense attorney to tell the defendant a) that the defendant has the right to testify and b) that, although the defense attorney will offer advice on this matter, the ultimate decision of whether to testify rests with the defendant.
>
> 3. If, after weighing the advice of counsel, the defendant decides not to testify, it is the responsibility of the defense attorney to request a hearing outside the presence of the jury at some point during the defense case.
>
> 4. At this hearing, through questions posed by the defense attorney, the defendant should affirm that 1) he understands he

has the right to testify; b) that he understands that no one can prevent him from exercising this right; c) that if he testifies the prosecutor will have the opportunity to cross-examine him; and, if applicable, d) that there is a possibility that his testimony might be impeached with prior criminal convictions. His waiver should then be made orally as part of the trial record.

5. A written waiver should also be made part of the trial record.

6. As a general rule, the prosecution and the trial judge should play no role in the proceedings. However, the trial judge may pose questions to the defendant and/or the defense counsel if the judge, in her discretion, believes that there is evidence that the defendant is not making a knowing and intelligent waiver of the right to testify.

CONCLUSION

In conclusion, the Petitioner, Ernesto Aleotti, respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and address the issue presented. The time is ripe, in the evolution of the principles of jurisprudence in the area of criminal law in the United States, that this last remaining substantive issue be resolved by this Honorable Court. There are, and will continue to be, an increasing number of criminal trials and, often, the Defendant will not testify. Thus, there will be more and more Appeals and Writ of Habeas Corpus, both at the State and Federal level, which Appeals and Writs involve this very issue. Thus, to eliminate these Appeals and for judicial economy, and for clarification of this issue for all Parties, the accused, the

lawyers, and for the Judges, this Court should address the question presented for review in this case. Hence, the Petitioner, Ernesto Aleotti, respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari, and establish the Rule of Law on this issue, once and for all. Thank you.

Respectfully submitted,

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